

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA
Plaintiff,

v.

MIGUEL CRESPO
Defendant.

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CIVIL ACTION
NO. 01-3214

CRIMINAL ACTION
NO. 92-339

MEMORANDUM AND ORDER

YOHN, J.

JANUARY_____, 2002

Miguel Crespo (“Crespo”) plead guilty to drug charges and was sentenced to 15 years imprisonment on March 25, 1993. On June 27, 2001, Crespo filed a pro se motion under 28 U.S.C. § 2255 to have his sentence vacated, set aside or corrected. In his § 2255 motion, Crespo argues that the Supreme Court’s decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), renders the statute under which he was convicted for cocaine distribution and his corresponding sentence unconstitutional. Because *Apprendi* does not warrant retroactive application on collateral review and the grounds defendant asserts to challenge his sentence are without merit, Crespo’s motion will be denied.

BACKGROUND

This action arises from defendant’s participation from 1984 until 1989 in the Rosario Cocaine Organization, which operated in Philadelphia, Pennsylvania. In June 1992, a federal

grand jury sitting in the Eastern District of Pennsylvania entered a superseding indictment charging Crespo and 13 codefendant's with numerous drug trafficking related offenses. Specifically, Crespo was charged with conspiracy to distribute more than five kilograms of cocaine in violation of 21 U.S.C. § 846, distribution of cocaine and aiding and abetting in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, distribution of cocaine at or near a school in violation of 21 U.S.C. § 845(a) and 18 U.S.C. § 2, and seven counts of unlawful use of a telephone in violation of 21 U.S.C. § 843(b). On November 6, 1992, Crespo pled guilty to conspiracy to distribute and distribution of cocaine. The other counts against Crespo were dismissed on motion by the government. On March 25, 1993, Crespo was sentenced to 15 years imprisonment, 10 years supervised release and a \$2000 fine. Crespo's sentence was enhanced as a result of his role as manager of the drug organization. On June 27, 2001, Crespo filed the instant motion to vacate, set aside or correct his sentence.

DISCUSSION

The grounds on which Crespo challenges his sentence arise from his interpretation and extension of the Supreme Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Apprendi*, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. Here, Crespo argues that the logic underlying the *Apprendi* rule renders § 841(a)(1) unconstitutional as written and his sentence unconstitutional as imposed. The *Apprendi* rule or any logical extension of it, however, does not provide a valid basis for Crespo's § 2255 motion. The problems with Crespo's

unconstitutionality claims are examined below.

I. Retroactive Effect of *Apprendi v. New Jersey*

In order for a habeas petitioner to benefit from a new court-made rule, as a threshold matter he must demonstrate that the rule applies retroactively. *O'Dell v. Netherland*, 521 U.S. 151, 155 (1997). In *In re Turner*, 267 F.3d 225 (2001), the Third Circuit considered whether the Supreme Court's decision in *Apprendi* is retroactively applicable to cases on collateral review. The Third Circuit noted that under *Tyler v. Cain*, --- U.S. ---, 122 S.Ct. 13 (2001), a court-made rule is retroactively applicable only if the Supreme Court explicitly states that it is, or if one or more holdings of that Court logically permit no other conclusion. In applying this standard to the *Apprendi* decision, the Third Circuit concluded that the Supreme Court had not made *Apprendi* retroactive to cases on collateral review. *In re Turner*, 267 F.3d at 225. Numerous other circuits are in accord with the Third Circuit. See e.g., *Forbes v. United States*, 262 F.3d 143, 144 (2d Cir. 2001); *United States v. Sanders*, 247 F.3d 139, 151 (4th Cir. 2001); *In re Clemmons*, 259 F.3d 489 (6th Cir. 2001); *United States v. Moss*, 252 F.3d 993 (8th Cir. 2001); *Hamm v. United States*, 269 F.3d 1247, 1249 (11th Cir. 2001); *Jones v. Smith*, 231 F.3d 1227, 1237-38 (9th Cir. 2000). Given that Crespo's conviction and sentence unquestionably became final prior to the issuance of the *Apprendi* decision on June 26, 2000, Crespo may not avail himself of its benefit in the instant motion.¹

¹ In its motion in opposition to Crespo's motion for relief under § 2255, the government chose not to pursue the issue of whether *Apprendi* applies retroactively. The government also did not raise any of the other possible procedural impediments to the defendant's claims.

II. Applicability of *Apprendi v. New Jersey*

Even if *Apprendi* were to be applied retroactively, it would provide no relief to Crespo. The Third Circuit has held that there cannot be an *Apprendi* violation where the defendant's sentence is under the statutory maximum. *United States v. Williams*, 235 F.3d 858, 863 (3d Cir. 2000). In this case, the maximum statutory penalty applicable to the crime of cocaine distribution to which Crespo pled guilty is 20 years imprisonment. 21 U.S.C. §§ 841(a), (b)(1)(C). Crespo, however, was only sentenced to 15 years imprisonment. Thus, in light of the Third Circuit's decision in *Williams*, there is no violation of *Apprendi* in Crespo's case which requires this court to grant his motion to set aside, vacate or correct his sentence.

Apparently, Crespo recognizes that the *Williams* precedent bars him from arguing that there is a straight-forward *Apprendi* violation in his case, as he raises three *Apprendi* arguments beyond the scope of the *Williams* decision as grounds for his § 2255 motion. Crespo's first argument is that in light of the *Apprendi* holding, 21 U.S.C. § 841(a), the statute under which Crespo was indicted and pled guilty for distributing cocaine, is facially unconstitutional. Crespo maintains that because *Apprendi* instructs that the penalties in § 841(b) be treated as elements of the offense and proven beyond a reasonable doubt, they should be part of § 841(a), the provision where the criminal conduct is outlined. The Third Circuit recently addressed this exact argument in *United States v. Kelly*, 272 F.3d 622 (2001), and found it to be without merit.² In holding that *Apprendi* did not render § 841 facially unconstitutional, the Third Circuit adopted the reasoning of

² The defendant's position on the unconstitutionality of 21 U.S.C. § 841(a)(1) finds some support in the Ninth Circuit decision in *United States v. Buckland*, 2001 WL 893440 (9th Cir. Aug. 9, 2001). However, on September 14, 2001, the Ninth Circuit ordered that this case be reheard *en banc*. As a result, the *Buckland* decision has been vacated and it may no longer be cited as precedent in the Ninth Circuit.

the Seventh Circuit in *United States v. Brough*, 243 F.3d 1078, 1079 (7th Cir. 2001):

It makes no constitutional difference whether a single subsection covers both elements and penalties, whether these are divided across multiple subsections (as § 841 does), or even whether they are scattered across multiple statutes . . . *Apprendi* holds that the due process clauses of the fifth and fourteenth amendments make the jury the right decision maker . . . and the reasonable-doubt standard the proper burden, when a fact raises the maximum lawful punishment. How statutes are drafted, or implemented, to fulfil that requirement is a subject to which the Constitution does not speak.

Id at 624 (quoting *United States v. Brough*, 243 F.3d 1078, 1079 (7th Cir. 2001)). Although it may be that Congress originally intended § 841(b) to be a list of factors to be determined by a court at sentencing, *Apprendi* now requires these factors to be presented to a jury. As the Third Circuit's decision in *Kelly* makes clear, a change in the interpretation of a statute by the Supreme Court does not make a statute unconstitutional as it is drafted. Accordingly, I reject Crespo's contention that § 841 is unconstitutional as it is written.

Crespo's second and third arguments are not entirely clear to this court. As close as this court can ascertain, Crespo's second argument is that because under *Apprendi* the quantity of drugs held by defendant is treated as an element of the offense and not simply a sentencing factor, it must be clearly established in the statute how drug quantity is to be measured. Doc. 34 at 20. Since the statutes under which Crespo was indicted and pled guilty do not clearly provide whether the drug quantity is to be measured by the largest individual drug exemplar held by defendant or in the aggregate, Crespo maintains that his sentence must be "void for vagueness." *Id*. Crespo's third argument appears to be that because under *Apprendi* sentencing factors are treated as

elements of the offense, in order for a defendant to be adequately charged with a crime, a defendant's charge must include the applicable sentencing factors. Doc. 34 at 22. It is undisputed that Crespo was not actually charged as a manager of the drug organization in his indictment but that his sentence was enhanced because of his manager role. As a result, Crespo argues that he was not made aware of the exact conduct that formed the basis of the government's accusation against him and that his sentence was unconstitutionally enhanced and should be vacated. *Id.* at 26. Crespo further argues that even if he were charged as a manager his sentence would have been unconstitutional, as the manager enhancement is a legal fiction that Congress did not specifically mandate as a basis for imposing penalties for drug trafficking violations. *Id.* at 28-29.

Both of these arguments are without legal merit. Crespo's motion is filled with numerous case-law citations, but none of them are relevant to the specific arguments he raises as grounds for relief. Crespo does not cite any Supreme Court or circuit court law which supports his proposed extensions of the *Apprendi* holding. As a result, I reject both of Crespo's attempts to use the logic underlying the *Apprendi* rule to establish the unconstitutionality of his sentence.

CONCLUSION

For all of the above mentioned reasons, this court finds that the *Apprendi* decision does not provide Crespo with a basis for relief. First, Crespo's argument is premised on the retroactive application of the *Apprendi* rule, but the Third Circuit has found that this rule does not apply retroactively on collateral review. Second, even if this court were to apply the *Apprendi* rule, it would provide no relief for Crespo, as his sentence does not exceed the maximum potential sentence for the drug trafficking crimes to which he was indicted and pled guilty. Third, Crespo's

argument that § 841(a) is unconstitutional as it is drafted was recently rejected by the Third Circuit in *United States v. Kelly*. Finally, Crespo does not cite any authority to support his arguments that the underlying rationale of the *Apprendi* holding establishes the unconstitutionality of his sentence. In sum, Crespo's motion to vacate, set aside, or correct his sentence will be denied.

An appropriate order follows.

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ORDER

And now, this _____ day of January 2002, upon consideration of defendant's motion to vacate, set aside or correct his sentence under 28 U.S.C. § 2255 (Doc. No. 34); the government's response (Doc. No. 40); and defendant's reply thereto (Doc. No. 41), it is hereby **ORDERED** that the defendant's motion is **DENIED**. It is further **ORDERED** that as there has been no substantial showing of the denial of a constitutional right, no certificate of appealability shall issue.

William H. Yohn, Jr., Judge